IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

KEVIN W. DAVIS, Plaintiff, v. PRISON HEALTH SERVICES, MR. FISH, DR. IVENS, DR. NIAZ MUHAMMED, and STANLEY TAYLOR, Defendants.	)	Civil Action No. 00-193-SLR

MEMORANDUM ORDER

I. INTRODUCTION

On March 20, 2000, plaintiff Kevin W. Davis filed this action against defendants Prison Health Services ("PHS"), Mr. Fish, Dr. Ivens, Dr. Niaz Muhammed and Stanley Taylor alleging a civil rights violation under 42 U.S.C. § 1983 in that medical neglect violated his Eighth Amendment right to be free from cruel and unusual punishment. (D.I. 2 at 3) Currently before the court are defendants' motions to dismiss the complaint for failure to exhaust administrative remedies and for failure to state a claim pursuant to Rule 12(b)(6). (D.I. 21, 23) For the reasons stated below, defendants' motions to dismiss are granted.

II. BACKGROUND

Plaintiff is an inmate within the Delaware Department of

Correction, housed at the Multi-Purpose Criminal Justice Facility ("MPCJF") in Wilmington, Delaware. (D.I. 22 at 1) Plaintiff alleges that since his incarceration at MPCJF on April 29, 1999 he has been under the care of PHS. (D.I. 2 at 3) Plaintiff further alleges that he notified PHS that he is H.I.V. positive, that he was on medication prescribed by his personal physician, and that he was tested every three months to record the progress of his condition. (Id.) Plaintiff states that he has "not been given some of [his] medication" and when he has been given blood tests, he has not been informed of the results. (Id.)

Plaintiff states that he did fill out and submit a grievance form. (Id. at 2) However, plaintiff states that as of the time he filed this action, his grievance has not been heard. (Id.)

III. STANDARD OF REVIEW

In analyzing a motion to dismiss pursuant to Rule 12(b)(6), the court must accept as true all material allegations of the complaint and it must construe the complaint in favor of the plaintiff. See Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir. 1998). "A complaint should be dismissed only if, after accepting as true all of the facts alleged in the

complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint." Id. Claims may be dismissed pursuant to a Rule 12(b)(6) motion only if the plaintiff cannot demonstrate any set of facts that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The moving party has the burden of persuasion. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).

IV. DISCUSSION

A. Exhaustion of Administrative Remedies

Defendants argue that plaintiff did not exhaust his administrative remedies prior to filing this action pursuant to the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a).[1] Before filing a civil action, a plaintiff-inmate

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[1]The PLRA provides, in pertinent part:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

must exhaust his administrative remedies, even if the ultimate relief sought is not available through the administrative process. See Booth v. Churner, 206 F.3d 289, 300 (3d Cir. 2000), cert. granted, 531 U.S. 956 (2000), aff'd, 121 S. Ct. 1819 (2001). See also Ahmed v. Sromovski, 103 F. Supp.2d 838, 843 (E.D. Pa. 2000) (quoting Nyhuis v. Reno, 204 F.3d 65, 73 (3d Cir. 2000) (stating that § 1997e(a) "specifically mandates that inmate-plaintiffs exhaust their available administrative remedies"). Prison conditions have been held to include the "environment in which prisoners live, the physical conditions of that environment, and the nature of the services provided therein." Booth, 206 F.3d at 295.

In the case at bar, although the entire medical grievance procedure was not completed, plaintiff sufficiently pursued his administrative remedies by filing a grievance form. Defendants have presented insufficient evidence to show any response to the grievance form, as mandated by the grievance procedure itself. (D.I. 22 Ex. B at V., ¶ 10) Thus, the court finds that plaintiff exhausted his administrative remedies.

B. Plaintiff's Eighth Amendment Claim

To state a violation of the Eighth Amendment right to adequate medical care, plaintiff "must allege acts or

omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976); accord White v. Napoleon, 897 F.2d 103, 109 (3d Cir. 1990). Plaintiff must demonstrate: (1) that he had a serious medical need; and (2) that the defendant was aware of this need and was deliberately indifferent to it. See West v. Keve, 571 F.2d 158, 161 (3d Cir. 1978); see also Boring v. Kozakiewicz, 833 F.2d 468, 473 (3d Cir. 1987). Either actual intent or recklessness will afford an adequate basis to show deliberate indifference. See Estelle, 429 U.S. at 105.

The seriousness of a medical need may be demonstrated by showing that the need is "'one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention.'" Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (quoting Pace v. Fauver, 479 F. Supp. 456, 458 (D.N.J. 1979)). Moreover, "where denial or delay causes an inmate to suffer a life-long handicap or permanent loss, the medical need is considered serious." Id.

As to the second requirement, an official's denial of an inmate's reasonable requests for medical treatment constitutes

deliberate indifference if such denial subjects the inmate to undue suffering or a threat of tangible residual injury. Id. at 346. Deliberate indifference may also be present if necessary medical treatment is delayed for non-medical reasons, or if an official bars access to a physician capable of evaluating a prisoner's need for medical treatment. Id. at 347. However, an official's conduct does not constitute deliberate indifference unless it is accompanied by the requisite mental state. Specifically, "the official [must] know . . . of and disregard . . . an excessive risk to inmate health and safety; the official must be both aware of facts from which the inference can be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). While a plaintiff must allege that the official was subjectively aware of the requisite risk, he may demonstrate that the official had knowledge of the risk through circumstantial evidence and "a fact finder may conclude that a[n] . . . official knew of a substantial risk from the very fact that the risk was obvious." Id. at 842.

The law is clear that mere medical malpractice is insufficient to present a constitutional violation. See Estelle, 429 U.S. at 106; Durmer v. O'Carroll, 991 F.2d 64, 67

(3d Cir. 1993). Prison authorities are given extensive liberty in the treatment of prisoners. See Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979); see also White, 897 F.2d at 110 ("[C]ertainly no claim is stated when a *doctor* disagrees with the professional judgment of another doctor. There may, for example, be several acceptable ways to treat an illness."). The proper forum for a medical malpractice claim is in state court under the applicable tort law. See Estelle, 429 U.S. at 107.

Plaintiff admits in his complaint that he has been given medication for his H.I.V. condition, although it may not be all of the medication that has been prescribed by his family doctor. (D.I. 2 at 3) Plaintiff also admits that he has been given blood tests, although they may not have been taken every three months and he has not been informed of the results. (Id.) The record does not indicate any form of deliberate indifference on behalf of the defendants and does not rise to a constitutional violation. "[C]ourts will not 'second-guess the propriety or adequacy of a particular course of treatment [which] remains a question of sound professional judgment.'" Boring, 833 F.2d at 473 (citing Pierce, 612 F.2d at 762). The plaintiff may disagree with the medical treatment which he is receiving, however, this does not support a § 1983 claim.

"Where the plaintiff has received some care, inadequacy or impropriety of the care that was given will not support an Eighth Amendment claim." Norris v. Frame, 585 F.2d 1183, 1186 (3d Cir. 1978) (citing Roach v. Kligman, 412 F. Supp. 521 (E.D. Pa 1976).

Plaintiff's complaint is based on a disagreement over the proper means of treatment and not a deliberate indifference to a medical need, accordingly, the first prong of the Estelle test is not satisfied.[2] See Boring, 833 F.2d at 473.

V. CONCLUSION

Therefore, at Wilmington this 5th day of February, 2002;

IT IS ORDERED that defendants' motions to dismiss (D.I. 21, 23) are granted.

United States District Judge

[2]Since plaintiff's complaint does not rise to a constitutional violation, there is no need to discuss the personal involvement of defendants.